JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE

CHESTER G. VERNIER AND WILLIAM G. HALE

ACCOMPLICES.

People v. *Keseling,* Calif. 170 Pac. 627.

Witnesses one of whom, employed by the state for that purpose, was treated by defendant and the other of whom paid for such treatment, were not "accomplices" to the crime of practicing dentistry without a license under Pen. Code, sec. 1111, as amended by St. 1915, p. 760, defining an accomplice as one who is liable to prosecution for the identical offense charged against the defendant, since when the commission of a crime by one person involves the co-operation of another person, the latter becomes an accomplice only in the event that his co-operation in the commission of the crime is corrupt.

Even though such witnesses were feigned accomplices, still their testimony needed no corroboration as the uncorroborated testimony of one who under the direction of officers of the law feigns complicity in the commission of a crime merely for the purpose of detecting and prosecuting the perpetrators thereof will support a conviction.

CONSTITUTIONAL LAW.

Mutart v. *Pratt,* Warden, Utah 170 Pac. 67. *Validity of indeterminate sentence law.*

Indeterminate sentence law (Laws, 1913, c. 100) does not violate Const., art. 5, sec. 1, prohibiting one department of the government from encroaching on the powers of another, because transferring the power of fixing duration of sentences from trial courts to an executive body. McCarty, J., dissenting.

Arver v. *United States,* 38 Sup. Ct. Repr. 159. *Validity of Selective Draft Law.*

Under Const., art. 1, sec. 8, authorizing Congress to declare war, to raise and support armies, and to make rules for the government and regulation of the land and naval forces, and to make all laws necessary and proper for carrying the foregoing powers into execution, and article 6, providing that the Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land, Congress has power to raise armies by conscription, and such power is not denied by reason of the fact that under the Constitution as originally framed state citizenship was primary, and United States citizenship but derivative and dependent thereon, or by the fact that, prior to the Constitution, the state authority over the militia embraced every citizen, and therefore Act, May 18, 1917, c. 15, providing for raising an army by means of a selective draft, is valid.

Act, May 18, 1917, c. 15, providing for the raising of an army by means of a selective draft, is not void as delegating federal powers to state officials because of some of its administrative features.

Act, May 18, 1917, c. 15, providing for raising an army by a selective draft, is not void, as vesting administrative officers with legislative discretion.

Act, May 18, 1917, c. 15, providing for raising an army by selective draft, is not void, as conferring judicial power on administrative officers.

Act, May 18, 1917, c. 15, providing for the raising of an army by means of a selective draft, and exempting from the draft regular or duly ordained ministers of religion and theological students under prescribed conditions, and also relieving from military service, other than service of a non-combatant character, members of religious sects whose tenets exclude the moral right to engage in war, does not violate Const., Amend. 1, providing that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

Act, May 18, 1917, c. 15, providing for raising an army by means of a selective draft, does not impose involuntary servitude, in violation of Const. Amend. 13.

CONSPIRACY.

Emma Goldman v. *United States,* 38 Sup. Ct. Repr. 166. *Conspiracy to induce disobedience to Selective Draft Law.*

Under Criminal Code (Act, March 4, 1909, c. 321), sec. 37, 35 Stat. 1096 (Comp. St., 1916, sec. 10201), sec. 37, providing that if two or more persons conspire to commit any offense against the United States, and one or more of them do any act to effect the object of the conspiracy, each of the parties shall be fined or imprisoned, or both, an unlawful conspiracy and the doing of overt acts in furtherance of the conspiracy is of itself inherently and substantively a punishable crime, irrespective of whether the result of the conspiracy has been to accomplish its illegal end.

EVIDENCE.

Greer v. *United States,* 38 Sup. Ct. Repr. 209. *Presumption of good character.*

On a criminal trial, there is no presumption of defendant's good character, since a presumption upon a matter of fact, when not merely a disguise for some other principle, is based on common experience, showing the fact to be so generally true that courts may notice the truth, and it is not common experience that the character of most people indicted by a grand jury is good.

Mr. Justice McKenna dissenting.

JURY.

Ruthenberg v. *United States.* 38 Sup. Ct. Repr. 168.

Socialists on trial for violations of the Selective Draft Law (Act May 18, 1917, c. 15), were not entitled, in examining jurors, to inquire whether they distinguished between Socialists and anarchists.

Socialists on trial for criminal offenses were denied no constitutional or statutory rights because the grand and trial juries were composed exclusively of members of other political parties and of property owners.

LIBEL.

State v. *Fish,* N. J. 102 Atl. 378. *Qualified privilege—Communication to electors.*

On an indictment for libel in informing the electorate of supposed facts concerning the previous record of the candidate in another public capacity, the defendant is not required to prove both the truth and the bona fides of the communication.

A communication relating to the fitness of a candidate for elective public office, made in good faith by one elector to other electors, for the purpose of enabling them to judge as to the propriety of voting for the candidate, is within the doctrine of qualified privilege.

Walker, Ch., and Heppenheimer and Williams, JJ., dissenting.

TRIAL.

State v. *Snider,* W. Va. 94 S. E. 981. *Right of accused to be present at all stages of felony trial.*

Where, in the progress of the trial of a felony case, the judge and the attorneys retire from the courtroom in which the trial is conducted to an anteroom, leaving the accused and the jury in the courtroom, and in such anteroom, and in the absence of the accused, an objection to the introduction of evidence is argued by the attorneys and passed upon by the judge, the accused is entitled to a new trial by reason of deprivation of his legal right to be personally present at every stage of his trial. A like result flows from such retirement by the judge, attorneys, and a witness, and interrogation of the witness, in the absence of the accused, after an objection to a question propounded to him has been sustained in the presence of the accused.

State v. *Harris,* Wash. 169 Pac. 971. *Separation of mixed jury.*

That during intermissions permitted by the court, and the noon recess, the woman juror was permitted to retire to the judge's chambers, would not warrant a new trial, where the ingress to the room remained closed under the supervision of duly sworn bailiffs, and no conversation was had by any one with the juror, and the 11 men jurors retired to the jury room during such periods; the statute making women eligible to jury service being in itself a change in the existing system relating to the separation of jurors broadening the meaning to be given to the term "separate."

ASSAULT BY HUSBAND UPON WIFE..

State v. *Lankford* (102 Atlantic Reports 63).

A husband, knowing that he is infected with a venereal disease, who, concealing the fact from his wife, communicates that disease to her is guilty of an assault and battery.

The problem involved, while not of great importance practically, because of the very few cases which actually get into the courts, raises nevertheless an interesting theoretical question: does the female by consenting to an act of sexual intercourse consent to the contact with her body of the infectous virus.

The courts in the two earliest cases involving this point and also Sherwood J. in a dissenting opinion in a more recent case (*State* v. *Marcks,* 43 S. W. 1097 (1898) did not regard this as the essential question, but proceeded upon the general ground that the defendant's fraud in concealing the fact that he was suffering from a venereal disease negatived the consent of the female, thus making him liable for an assault. *Reg.* v. *Bennet,* 4 Fos. & Fin. 1105 (1866) where the defendant was convicted of an assault, while diseased, upon his niece. *Reg.* v. *Sinclair,* 13 Cox C. C. 28 (1867), where the facts were similar, the female being twelve years of age.

The doctrine laid down in these two latter cases was, however, questioned and, in fact, differed from by the court in *Heggarty* v. *Shine* 14 Cox C. C. 128

and was actually overruled by the leading case of *Reg.* v. *Clarence* 22 Q. B. Div. 23 in which case it was held that a husband could not be convicted of an assault upon his wife by communicating to her a venereal disease from which he knew he was suffering, if she consented to the act of intercourse. The court vigorously attacked the theory upon which the courts in the two preceding cases had proceeded, namely, that fraud vitiates consent. Wills J. saying: "That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law." In the face of this decision, however, in *Trammell* v. *Vaughn* 51 L. R. A. 857 which was an action for breach of promise where the defendant alleged as an excuse for refusing to marry the fact that he had without any fault subsequently contracted a venereal disease, Marshall J. cites *Reg.* v. *Bennet, Reg.* v. *Sinclair* and *State* v. *Marcks* (supra) with approval, saying that to have had intercourse under such circumstances would have been an assault and therefore unlawful.

The principle that fraud does not negative consent as a question of fact (although it may sometimes affect the legal consequences of consent) is a well established principle and yet it is submitted that the results arrived at in *Reg.* v. *Bennet* etc. (supra) are correct and should be supported upon principle, although upon other grounds. This has been suggested by Hawkins J. who wrote a dissenting opinion in *Reg.* v. *Clarence*: "if a person, having a privilege of which he may avail himself or not at his will and pleasure cannot exercise it without at the same time doing something not included in this privilege, and which is harmful and dangerous to another, he must either forego his privilege, or take the consequences of his unlawful conduct."

If it is true that fraud does not negative consent when once given, it is equally true that consent, being a question of mental attitude does not exist where things additional to that for which consent was originally given, are either given or done. (See F. H. Beale "Consent in the Criminal Law 8 H. L. Review 317) and so in *Com.* v. *Stratton* 114 Mass. 303 it was held that there was no consent on the part of the female to take a poisonous powder which had been put into a fig by the defendant and given to her, and for the resulting sickness the defendant was held liable for an assault.

It would seem, therefore, that while fraud does not negative consent when once given, that in cases like the present there was never consent to the contact of infectuous disease germs with the body. Consent to the act of intercourse and consent to the contact with the disease germs is consent with regard to two essentially different things and consent to the one no more implies consent to the other than in *Com.* v. *Stratton* consent to take the figs implied consent to take the poison.

Stanford University, Calif. HAROLD SHEPHERD.

State of Louisiana v. *Walter L. Daniel,* By Mr. Justice O'Neill. *Concealed Weapons.*

Appeal from the Sixth Judicial District Court, Parish of Moorehouse—Ben C. Dawkins, Judge.

* * * * * *

The defendant was prosecuted for carrying concealed weapons. With the view of invoking the provision of Section 974 of the Revised Statutes, authorizing the judge to sentence any person convicted the second or third time of

the same offense to double or triple the penalty imposed by law, it was alleged in the bill of information that the defendant had already been convicted twice of the offense of carrying concealed weapons. The date of each of the previous convictions was stated in the bill of information, and it was alleged that the purpose was to inform the defendant of the intention to have him sentenced, in the event of the third conviction, to double or triple the penalty imposed by the statute forbidding the carrying of concealed weapons.

The defendant filed a motion to quash the bill of information, on the ground that, by charging the two previous offenses and convictions, for the purpose of showing an aggravation of the third offense charged, the bill of information charged the commission of more than one crime, and was invalid for duplicity. He alleged that the charging of the previous offenses and convictions would have the effect of prejudicing his defense of the prosecution for the offense for which he had not been convicted or tried.

The motion to quash the bill of information was overruled, and a bill of exceptions was reserved to the ruling. The defendant was tried and convicted and was sentenced to pay a fine of $500 and the costs of the prosecution and to serve six months imprisonment in the parish jail, subject to work on the public roads, and, in default of his paying the fine and costs, to serve an additional term of six months imprisonment in the parish jail subject to road duty, the terms of imprisonment not to be concurrent. The defendant has appealed from the conviction and sentence, and, in addition to the complaints urged in the bills of exception, complains that the sentence of both fine and imprisonment was not authorized by law.

In support of his motion to quash the bill of information, the learned counsel for the defendant relies upon the decision in *State* v. *Hudson,* 32 La. Ann. 1052, where it was held that a previous conviction for a similar offense should not be charged in the indictment, but that, after verdict and before sentence to double the penalty under Section 974 of the Revised Statutes, the prisoner should be allowed to show cause, if any he has, why the increased punishment should not be inflicted on account of the previous conviction. That decision was expressly overruled in the case of *State* v. *Compagno,* 125 La. 672, 51 South 681; and we are not ready to reinstate the doctrine. It was based upon a consideration that can have no application to a prosecution for a misdemeanor, which is tried before the judge without a jury, that is, that the charging of a previous offense and conviction might prejudice the defendant before the jury. We adhere to the doctrine of the later decision, *State* v. *Compagno,* supra.

Another bill of exception was reserved to the ruling of the district judge permitting the introduction in evidence on behalf of the State of other evidence of the previous convictions than a judgment of conviction. The contention of the defendant's counsel was and is that the judgments of conviction of the first and second offense being the best evidence thereof, the minutes of the court showing that the defendant had been twice previously convicted and sentenced was only secondary evidence. The judge overruled the objection because, the offense being a misdemeanor, no formal judgment and conviction had been signed or written. The only evidence of the previous convictions was contained in the minutes of the court, which were introduced in evidence on the trial of this prosecution. Our opinion is that the ruling was correct.

There appears in the record another bill of exceptions, which has not been urged on appeal and which we presume has been abandoned. It refers to a request of the defendant's counsel that the trial judge charged or maintained certain legal propositions. We find no merit in the bill of exceptions, because the judge did, in effect, sustain the legal propositions submitted by the defendant's counsel.

We find no error in the conviction; but we are of the opinion that there was no authority for imposing upon the defendant the penalty of both fine and imprisonment.

Section 974 R. S. provides that the judge shall have the power to sentence any person who may be convicted for a second or third offense to double or triple the penalty imposed by law. The penalty imposed by law, for carrying concealed weapons, is a fine or imprisonment, the fine to be not less than $100 nor more than $500, and the imprisonment to be not less than 60 days nor more than 6 months in the parish prison. See Act No. 43 of 1908, p. 58. There is no authority for imposing the penalty of both fine and imprisonment for the carrying of concealed weapons. Following the precedent established in *State* v. *Anderson,* 125 La. 779, 51 South. 846, and approved in the case of *State* v. *Vickie McCue,* No. 22,351, decided this day, we are constrained to annul and set aside the sentence imposed in this case, and to remand the case to the district court, in order that the defendant may be sentenced according to law.

For the reasons assigned, the judgment convicting the defendant is affirmed, but the sentence imposed upon him is annulled and set aside, and this case is remanded to the district court in order that the defendant may be sentenced according to law.

SYLLABUS

(1) In order to convict the defendant of the aggravated offense of repeating the commission of the same misdemeanor, and to give the court authority to impose double or triple the penalty imposed by law for the first offense, it is proper and necessary to charge the previous offenses and convictions in the bill of indictment or information.

(2) There being no written judgment of conviction of a misdemeanor, the minutes of the court showing the conviction and sentence furnish the best evidence of the fact and are admissible in evidence in a subsequent prosecution, to give the court authority to impose double or triple the penalty imposed by law for the first offense.

(3) The statute declaring the penalty for carrying concealed weapons to be fine or imprisonment in the parish jail does not give the court authority to impose both fine and imprisonment.

W. O. HART, *New Orleans.*

INTOXICATING LIQUORS.

United States v. *Mitchell,* 245 Fed. 601. *Interstate "Transportation," "Commerce."*

The Act of Congress, March 3, 1917, C. 162, 39 Stat. 1058, 1069, making appropriations for the service of the Post Office Department, declares in section 5, after providing penalties for use of mails in advertising or soliciting orders for liquor in territory where by the local laws it is unlawful to so advertise or solicit liquor orders, that whosoever shall order, purchase, or cause

intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes, into any state or territory, the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors, shall be punished, provided that nothing therein shall authorize a shipment of liquor into any state contrary to the laws of such state. The accused carried as personal baggage one quart of intoxicating liquor from Kentucky into the state of West Virginia, which liquor was intended for his own use. Held, that, as "Commerce" is defined as the exchange of merchandise on a large scale between different places or communities, or, as extended trade or traffic, the accused was not guilty of a violation of the Act of March 3, 1917; his transportation of liquors into the state of West Virginia not amounting to interstate commerce, the word "commerce" not being synonymous with "transportation."

"MILITARY FORCES OF THE UNITED STATES."

United States v. *Sugarman,* 245 Fed. 604. *Attempt to cause insubordination.*

The defendant was indicted under the Act of June 15, 1917, section 3, providing that, "Whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States * * * shall be punished." He was charged with urging young men, who had been registered under the Act of Congress and who had received their serial numbers not to report for military duty. On a motion for a directed verdict, the question was presented, whether these men were "in the military or naval forces of the United States." Held, they were. The court said: "Considering * * * the broad purposes of the Act of May 18, 7917 [the Selective Draft Act], considering the evils that were intended to be met by section 3 thereof, considering the language of the section, [of the Act of June 15, 1917], I am of the opinion that the words 'military forces' therein should be given a broad, rather than a narrow, meaning, and should be held to mean, not merely the men that are in active military service, but also men who had registered and had received their serial numbers from Washington, and that is as far as it is necessary to hold in this particular case."

VARIANCE.

State v. *Spahr. Variance as to instrument used in homicide.*

The indictment charged that the defendant killed the victim by striking him with a shovel. The proof was to the effect that he struck him with a brick or stone. It was held that this did not constitute a variance. "In general, it may be said that although an indictment for murder alleges that the act was done with a specified instrument, it is not necessary to prove that the act was done with that particular instrument. If the proof shows that the crime was committed through other means, it is sufficient if the nature of the violence and the kind of injury resulting in death is the same." In the case in hand the "nature of the attack * * * is essentially the same."

House v. *State,* 117 N. E. 647 (Ind.) *Conviction of offense different from that charged.*

The indictment charged the accused with kidnapping. He was convicted of assault and battery. Judgment reversed. The offense of assault and battery

is not included in the offense of kidnapping. The rule is that to be included in the greater offense, the lesser offense must be such that it is *impossible* to commit the greater without having first committed the latter. The offense of kidnapping may be established without proof of touching, hence without necessarily proving a battery.

Wong Goon Let v. *United States,* 245 Fed. 745. *Adultery.*

The defendant asserts a fatal variance between the allegations of the indictment and the evidence, in that the indictment alleged that the defendant was married to Wuai Kam Let, while the proof showed that the wife's name was Foo Kwai Kim. Held, as there was evidence that at the time of the offense charged the defendant was lawfully married to a woman other than his alleged paramour, the variance between the name of his wife as pleaded in the indictment and as shown at the trial was immaterial.

PRIVATE DETECTIVES.

Negligently Alienated Wife's Affections.

A husband, who suspected his wife's faithfulness, employed a detective agency, which undertook to shadow the suspected woman. But the agency, so the husband alleged, got its wires crossed and proceeded to shadow another woman, by mistake. Conduct very unbecoming a dutiful wife was reported to the suspicious husband, whereat he charged his wife with being guilty of most reprehensible conduct, whereof she was entirely innocent, wherefore her affections were forever alienated; therefore she left him, wherein he was damaged for the negligent act of the sleuths. The Supreme Court of Minnesota said that, to render an intermeddler liable for alienating the wife's affections, the act must have been purposely and knowingly done, and mere negligent conduct was not actionable. *Lilligren* v. *William J. Burns International Detective Agency,* 160 Northwestern Reporter, 203.

This is a subject which demands immediate reform and substantial protection to the citizens of the community. In Georgia, every private detective must report his findings every day to the chief of police in whose district he is conducting his investigations; the authorities are thus kept informed and the opportunity for concealing crime is thus minimized. The citizen is in that way protected from encroachments upon his person and character; in Japan "shadowing a person without just cause" is a crime; unskilful detectives, "chump coppers," and half-educated spies are a menace to the community and should be eradicated as a "moral cancer." With all due respect to the Minnesota Supreme Court I question the soundness and good law of that decision; people who hold themselves out by their "advertisement as possessing unusual skill," should be held accountable for negligence. The court ought to know that they charge good prices for "skilful detective work"; expert services demand "extra pay" and should be held legally liable for acts of bungling ignorance. Some states hold that private detectives are liable in tort to the person damaged by reason of negligence or lack of skill; to hold otherwise would be to allow individuals to cash their own ignorance and to place skill on the same level with ignorance and illiteracy.

JOSEPH MATTHEW SULLIVAN, *Boston.*

FREE TRANSPORTATION OF POLICE.

The provision of N. J. Act of May 26, 1912 (Pamph. Laws, p. 235) requiring street railway companies to grant free transportation to police officers when

in uniform or on duty, is held a constitutional exercise by the legislature of its police power in *State* v. *Sutton,* 87 N. J. L. 192, 94 Atl. 788, Ann. Cas. 1917C, 91, L.R.A.1917E, 1176.

The object expressed by the language of the statute in question being one that the legislature may lawfully accomplish under its police power, the court further refused to declare the statute to be unconstitutional upon the ground that the purpose of the legislature was to exact from the public utilities a money tribute in violation of constitutional principles: First, because the purpose of the legislature is known to the courts only in so far as it appears in the object expressed by the language of its enactment; and, second, because, in dealing with the language of an enactment, the courts adopt, if possible, that construction which will sustain the statute as a valid act of legislation.

In *Sutton* v. *New Jersey,* 244 U. S. 258, 61 L. ed. 1117, P.U.R.1917E, 682, 37 Sup. Ct. Rep. 508, the United States Supreme Court, in affirming the judgment of the New Jersey court of appeals, above referred to, said: "Freedom to come and go upon the street cars without the obstacle or discouragement incident to payment of fares may well have been deemed by the legislature essential to efficient and pervasive performance of the police duty. Increased protection may thereby inure to both the company and the general public without imposing upon the former an appreciable burden. If any evidence of the reasonableness of the provision were needed, it could be found in the fact that such officers had been voluntarily carried free by the company and its predecessors for at least eighteen years prior to July 4, 1910, when the practice was prohibited by the Public Utilities Act." The Supreme Court also held specifically that the requirement that city detectives not in uniform be carried free on the street cars when in the discharge of their duties was not an arbitrary or unreasonable exercise of the police power.

JOSEPH MATTHEW SULLIVAN, *Boston, Mass.*